Parker

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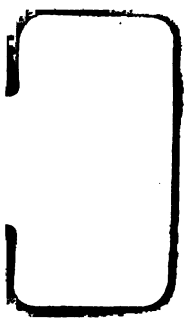

HABEAS CORPUS

AND

MARTIAL LAW.

A REVIEW OF THE OPINION OF CHIEF JUSTICE TANEY, IN THE CASE OF JOHN MERRYMAN.

By JOEL PARKER.

Second Edition. Published by Authority.

PHILADELPHIA:
JOHN CAMPBELL, BOOKSELLER,
419 CHESTNUT STREET.
1862.

MEMORANDUM.—To the Students in the Law School of Harvard College, June 11, 1861, the argument contained in the following pages will not be novel, as it was then presented to their consideration, in a Lecture delivered by the author as Royall Professor of Law in that Institution.

It has since been revised, and is published in the October number of the North American Review.

CAMBRIDGE, *October* 1, 1861.

HABEAS CORPUS AND MARTIAL LAW.

THE opinion of Chief Justice Taney, in the case of John Merryman, has necessarily attracted much attention. Several of the accompanying circumstances have given it unusual prominence. The case was one, as most of our readers well know, in which Merryman, being held as a prisoner at Fort McHenry, the headquarters of General Cadwalader, then in command of the military department in which the fort is situated, applied to Chief Justice Taney, the head of the judiciary of the United States, for a writ of *habeas corpus*, in order that he might thereby be brought before the Chief Justice and delivered from imprisonment, upon the ground that it was without lawful warrant, unjust, and oppressive. Merryman was arrested by a military force, without any warrant from a magistrate, on charges of treason and rebellion founded upon certain acts done by him at, or immediately after, the attack by a mob upon the Sixth Regiment of Massachusetts Volunteers, in its passage through Baltimore; the mob being incited to violence through the agency of secessionists inhabiting that city, and the regiment being on its way to Washington to sustain the government of the United States, then gravely menaced by the insurrection in the Southern States,—the capital itself being threatened by the leaders of the insurrection. Troops from Pennsylvania proceeding to Washington for the same purpose, were attacked and turned back by the same mob. It was alleged, especially, that Merryman had participated in the destruction of the railroad and bridges, with the design of preventing other troops from reaching the capital by the route through Baltimore. Fort McHenry, in the immediate vicinity of Baltimore, was at the time of the arrest held and occupied for the purposes of the war, which had

then just commenced, and was regarded as a very important military post, serving among other purposes as a check—and perhaps for the time as the only effectual check—upon the disaffected part of the population of Baltimore.

The further facts which led to the issuing of the writ of *habeas corpus*, as prayed for, are stated by the Chief Justice, in the opinion delivered by him as follows:—

"The petition presents the following case. The petitioner resides in Maryland, in Baltimore County. While peaceably in his own house with his family, he was, at two o'clock on the morning of the 25th of May, 1861, arrested by an armed force, professing to act under military orders. He was then compelled to rise from his bed, taken into custody, and conveyed to Fort McHenry, where he is imprisoned by the commanding officer, without warrant from any lawful authority.

"The commander of the fort, General George Cadwalader, by whom he is detained in confinement, in his return to the writ, does not deny any of the facts alleged in the petition. He states that the prisoner was arrested by order of General Keim, of Pennsylvania, and conducted as a prisoner to Fort McHenry by his order, and placed in his (General Cadwalader's) custody, to be there detained by him as a prisoner.

"A copy of the warrant or order under which the prisoner was arrested was demanded by his counsel, and refused. And it is not alleged in the return that any specific act, constituting an offence against the laws of the United States, has been charged against him upon oath, but he appears to have been arrested upon general charges of treason and rebellion, without proof, and without giving the names of the witnesses, or specifying the acts which, in the judgment of the military officer, constituted these crimes. And having the prisoner thus in custody upon these vague and unsupported accusations, he refuses to obey the writ of *habeas corpus*, upon the ground that he is duly authorized by the President to suspend it.

"The case, then, is simply this. A military officer residing in Pennsylvania, issues an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof, so far as appears. Under this order, his house is entered in the night, he is seized as a prisoner and conveyed to Fort McHenry, and there kept in close confinement. And when a *habeas corpus* is served on the commanding officer, requiring him to produce the prisoner before a Justice of the Supreme Court, in order that he may examine into the legality of the imprisonment, the answer of the officer is that he is authorized by the President to suspend the writ of *habeas corpus*

at his discretion, and, in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ.

"As the case comes before me, therefore, I understand that the President not only claims the right to suspend the writ of *habeas corpus* himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him.

"No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the President claimed this power, and had exercised it in the manner stated in his return. And I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended, except by act of Congress."

From the concluding part of the opinion, it appears that the Chief Justice not only denies the right of the President to suspend the writ of *habeas corpus*, and the right of General Cadwalader to decline compliance with the command of the writ requiring him to appear with the prisoner and show the cause of the detention, but he also denies the right of the military authority to make searches, seizures, and arrests without warrant; and he insists that "great and fundamental laws, which even Congress itself could not suspend, have been disregarded and suspended, like the writ of *habeas corpus*, by a military order, supported by force of arms." We quote this part of the opinion, as it has an important bearing upon the reasoning of the Chief Justice.

If the arrest might be made by the military authority, without warrant, then it will probably be admitted that the same authority, on making return of the nature of the arrest and detention, may decline to produce the prisoner upon the writ of *habeas corpus*.

"But the documents before me show that the military authority in this case has gone beyond the mere suspension of the privilege of the writ of *habeas corpus*. It has, by force of arms, thrust aside the judicial authorities, and officers to whom the Constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers; for at the time these proceedings were had against John Merryman, the

District Judge of Maryland, the Commissioner appointed under the act of Congress, the District Attorney, and the Marshal, all resided in the city of Baltimore, a few miles only from the home of the prisoner. Up to that time there had never been the slightest resistance or obstruction to the process of any court or judicial officer of the United States in Maryland, except by the military authority. And if a military officer, or any other person, had reason to believe that the prisoner had committed any offence against the laws of the United States, it was his duty to give information of the fact, and the evidence to support it, to the District Attorney; and it would then have become the duty of that officer to bring the matter before the District Judge or Commissioner, and, if there was sufficient legal evidence to justify his arrest, the Judge or Commissioner would have issued a warrant to the Marshal to arrest him, and, upon the hearing of the party, would have held him to bail, or committed him for trial, according to the character of the offence, as it appeared in the testimony, or would have discharged him immediately, if there was not sufficient evidence to support the accusation. There was no danger of any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military.

"And yet, under these circumstances, a military officer, stationed in Pennsylvania, without giving any application to the District Attorney, and without any information to the judicial authorities, assumes to himself the judicial power in the District of Maryland, undertakes to decide what constitutes the crime of treason or rebellion, what evidence (if, indeed, he required any) is sufficient to support the accusation and justify the commitment, and commits the party, without having a hearing even before himself, to close custody in a strongly garrisoned fort, there to be held, it would seem, during the pleasure of those who committed him.

"The Constitution provides, as I have before said, that 'no person shall be deprived of life, liberty, or property, without due process of law.' It declares that 'the right of the people to be secure in their person, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' It provides that the party accused shall be entitled to a speedy trial in a court of justice.

"And these great fundamental laws, which Congress itself could not suspend, have been disregarded and suspended, like the writ of *habeas corpus*, by a military order supported by force of arms. Such is the case now before me; and I can only say, that, if the authority which the Constitution

has confided to the Judiciary Department, and judicial officers, may thus, upon any pretext and under any circumstances, be usurped by the military power at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty, and property at the will and pleasure of the army officer in whose military district he may happen to be found.

"In such a case, my duty was too plain to be mistaken. I have exercised all the power which the Constitution and laws confer on me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given to him. I shall therefore order all the proceedings in this case, with my opinion, to be filed and recorded in the Circuit Court of the United States for the District of Maryland, and direct the Clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation 'to take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced."

The liberty of the subject, and the writ of *habeas corpus* as the means of protecting that liberty from unlawful interference, have long been the pride and boast of Englishmen; and the American people, as is abundantly shown in the Constitution and laws of the United States, and of the several States, have been not less jealous for the one, or less tenacious of the other. It is apparent, therefore, that whatever addresses itself to the popular mind as a vindication of the right of personal freedom against oppression in any of its forms, must meet a ready and hearty approval; and if the Chief Justice, as is undoubtedly the fact, has failed to secure the support of the people in the assertion of his right to deliver Merryman from his imprisonment, it must be because there were circumstances of no ordinary character involved in the case, which deprived the party imprisoned of the popular sympathy, and led to grave doubts whether the principles of law relied on by the judicial magistrate ought to, or do in fact, govern cases of that character.

Upon a superficial examination of the case, as stated by the Chief Justice, it is not surprising, perhaps, that he should have come to the conclusion that the return to the writ was insufficient.

But there is no case which in all its circumstances comes up to this, and there are certain matters of law and fact bearing upon it, and appearing to deserve great weight, which do not seem to have presented themselves to his mind. He does not discuss the question how far the provisions of the Constitution which he cited in the latter part of the opinion have reference to a state of actual war existing in the country,—how far they may be modified or controlled in their operation by other provisions of the Constitution which in a state of war may have a bearing upon the case,—nor how far the authorities which he cites have a just application to the facts which he must have known were not only existing, but which had a controlling influence in producing the case before him.

It may be thought that the question, whether General Cadwalader might not lawfully decline to obey the command of the writ, or suspend its operation, because it would require him to abandon for the time being the performance of his military duties, and because he held the prisoner under military or martial law, was not presented to the Chief Justice by the return, which stated that the President had authorized a suspension of the writ of *habeas corpus*. But if the return did not in terms present that question to him, it was, notwithstanding, before him, and he passed upon it; for, after stating that Mr. Jefferson did not claim the power to suspend the writ, but referred the matter to Congress, he said in the opinion:—

"Having, therefore, regarded the question as too plain and too well settled to be open to dispute, if the commanding officer had stated that upon his own responsibility, and in the exercise of his own discretion, he refused obedience to the writ, I should have contented myself with referring to the clause in the Constitution, and to the construction it received from every jurist and statesman of that day when the case of Burr was before them. But being thus officially notified that the privilege of the writ has been suspended under the orders and by the authority of the President, and believing as I do, that the President has exercised a power which he does not possess under the Constitution, a proper respect for the high office he fills requires me to state plainly and fully the grounds of my opinion, in order to show that I have not ventured to question the legality of his act without a careful and deliberate examination of the whole subject."

It seems, therefore, upon his own showing, that if General Cadwalader had made a return that he claimed to hold the prisoner by the general law martial, which suspended the *habeas corpus*, and rendered his military duties and obligations inconsistent with a compliance with the requirements of the writ, the Chief Justice would have disposed of the case without arguing the question.

There are some cases which have a tendency to support his conclusion. How far they can justify it, we shall see as we proceed. We propose at this time to follow out the investigation thus indicated.

If it were admitted that the same rules are applicable to the issue and determination of the *habeas corpus* in time of war as those which govern the subject in time of peace, then it must also be admitted that the opinion of the Chief Justice is well sustained; but if it shall appear that war brings with it its own rules, prescribing the powers and duties of military commanders, and their relations to persons within their military jurisdiction, then his reasoning may fail in its application to the case before him, and the opinion may be shown to have no sufficient foundation.

It may be well in the first place to consider briefly the nature and character of the writ of *habeas corpus*, as deducted from its early history, although there is very little in its practical application in England which can serve to throw light upon the present questions.

It is said that there are various kinds of the writ of *habeas corpus*; but it might perhaps with greater precision be said, that the writ is used for several different purposes, and the terms which designate the different purposes have been applied as designations for different writs; as, for instance, the *habeas corpus ad respondendum*, where the body of the party is brought into court that he may answer to what is charged against him; the *habeas corpus ad testificandum*, where a party imprisoned is brought in to testify as witness, and other cases furnishing similiar descriptions.

"But the great and efficacious writ in all manner of illegal confinement," says Blackstone, "is that of *habeas corpus ad subjiciendum*, directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his capture and detention, *ad faciendum*

dum, subjiciendum, et recipiendum, to do, submit to, and receive, whatsoever the judge or court awarding the writ shall consider in that behalf. This is a high prerogative writ, and therefore, by the common law, issuing out of the King's Bench not only in term time, but also during the vacation by a *fiat* from the chief justice or any other of the judges, and running into all parts of the king's dominions; for the king is entitled at all times to have an account why the liberty of any of his subjects, is restrained, wherever that restraint may be inflicted."*

There seems to be no authentic account of the issue of the writ until long after Magna Charta, although it is said to be of right by the common law, which may be true in the sense that it has its foundation in the principles of the common law.

Coke says that "Magna Charta was for the most part declaratory of the principal grounds of the fundamental laws of England, and for the residue it is additional to supply some defects of the common law."† But the Great Charter did not in terms provide for or recognize any right to this particular remedy. The provisions which declare the right of the subject, and perhaps serve to sustain this writ as an appropriate remedy for any unlawful restraint of his person, are,—

"*Nullus liber homo capiatur, vel imprisonetur, aut disseisietur, de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terræ*

"*Nulli vendemus, nulli negabimus, aut differemus, justitiam vel rectum.*"

As translated in Coke, these provisions read:—

"No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land.

"We will sell to no man, we will not deny or defer to any man either justice or right."‡

There have been some differences of translation not material to the present discussion.

That these provisions of the Great Charter did not secure to the subject deliverance from imprisonment at the will of the crown, even

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* 3 Blackstone's Commentaries, 131.

† 2 Inst. 66 *et seq.*

‡ 2 Inst. 45.

in times of peace, and that the general principles of the common law, as then administered, furnished no better security, is apparent from the fact that in 1627, more than four centuries afterward, a writ of *habeas corpus* was issued in the case of John Hampden and others, to which the Warden of the Fleet returned that they were detained by a warrant from the Privy Council, that no particular cause was assigned, but that they were committed by the special command of his Majesty; and the court held this a sufficient return. Undoubtedly the decisions of the judicial tribunals at that period, upon subjects involving the prerogatives of the crown, cannot be regarded as of high authority. This case led to divers proceedings in Parliament condemnatory of the decision; to the Petition of Right, for the better security of the liberty of the subject; and to the *habeas corpus* act, in the thirty-first year of Charles II., which recited that "great delays have been used by sheriffs, jailers, and other officers, to whose custody any of the king's subjects have been committed for criminal or for supposed criminal matter, in making returns of writs of *habeas corpus* to them directed," and then enacted, in substance, that whensoever any person should bring a writ of *habeas corpus*, directed to any sheriff or other person, for any person in his custody, the officer should, within three days after service of the writ in the mode designated, (except in certain cases enumerated,) upon payment of charges and security given, bring, or cause to be brought, the body of the party so committed or restrained, unto or before the Lord Chancellor, according to the command thereof, and certify the cause of his commitment. There were divers provisions regulating the subsequent proceedings. It has been said that this statute was designed to secure the benefit of the writ, rather than to extend its operation, one great object being to insure the performance by the judges of their duty.

Mr. Chief Justice Taney says in his opinion:—

"The right of the subject to the benefit of the writ of *habeas corpus*, it must be recollected, was one of the great points in controversy during the long struggle in England between arbitrary government and free institutions, and must, therefore, have strongly attracted the attention of statesmen engaged in framing a new, and, as they supposed, a freer government than the one which they had thrown off by the Revolution.

For, from the earliest history of the common law, if a person was imprisoned—no matter by what authority,—he had a right to the writ of *habeas corpus* to bring his case before the King's Bench; and if no specific offence was charged against him in the warrant of commitment, he was entitled to be forthwith discharged; and if any offence was charged which was bailable in its character, the court was bound to set him at liberty on bail. And the most exciting contests between the crown and the people of England from the time of Magna Charta were in relation to the privilege of this writ, and they continued until the passage of the statute of 31st Charles II., commonly known as the great *habeas corpus* act.

"This statute put an end to the struggle, and finally and firmly secured the liberty of the subject from the usurpation and oppression of the executive branch of the government. It nevertheless conferred no new right upon the subject, but only secured a right already existing. For, although the right could not be justly denied, there was often no effectual remedy against its violation. Until the statute of the 13th of William III. the judges held their offices at the pleasure of the king, and the influences which he exercised over timid, timeserving, and partisan judges, often induced them, upon some pretext or another, to refuse to discharge the party, although he was entitled to it by law, or delayed the decisions from time to time, so as to prolong the imprisonment of the persons who were obnoxious to the king for political opinions, or had incurred his resentment in any other way.

"The great and inestimable value of the *habeas corpus* act of the 31st Charles II. is, that it contains provisions which compel courts and judges, and all parties concerned, to perform their duties promptly, in the manner specified in the statute."

If by this the Chief Justice refers to imprisonment for alleged offences in time of peace, and to detentions having no connection with military operations in time of war, it may be true, theoretically; but it is quite clear, that neither Magna Charta nor the common law prescribes rules to govern the conduct of a war, or professes to set forth the principles which in time of war shall regulate the military service of the country; and we have found no case in England in which the writ of *habeas corpus* has been used, in time of war, to deliver from any detention by military authority, which detention had its origin in causes and proceedings connected with the war. So far from its being true that "from

the earliest history of the common law, if a person was imprisoned, no matter by what authority, he had a right to the writ of *habeas corpus*, to bring his case before the King's Bench, and if no specific offence was charged against him in the warrant of commitment, he was entitled to be forthwith discharged,"—and that the statute of Charles II. secured such right already existing,—it is a fact, that, more than a century after the passage of the act, "a gentleman having been impressed before the commissioners, under a pressing act passed in the preceding session, and confined in the Savoy, his friends made application for a writ of *habeas corpus*, which produced some hesitation and difficulty; for according to the above statute, the privilege relates only to persons committed for criminal or supposed criminal matter." Before the question could be determined, he was discharged on an application to the Secretary at War. This case being supposed to show a defect in the statute of Charles II., a bill was introduced into Parliament, in 1757, for giving a more speedy remedy to the subject upon the writ of *habeas corpus*. The bill was passed by the House of Commons, but was thrown out on its second reading in the House of Lords, principally, it would seem, through the agency of Lord Mansfield. He made a speech upon it in June, 1758, of which Horace Walpole said, "I am not averse to own that I never heard so much argument, so much sense, so much oratory united." In the course of this speech, according to a report of Dr. Birch, cited by Lord Campbell, Lord Mansfield, among other things, said, "that the writ of *habeas corpus* at common law was a sufficient remedy against all these abuses which this bill was supposed to rectify." But such evidently was not the view of Lord Campbell, who says: "I am concerned to say that Lord Mansfield, from whom better things might have been expected, stirred up a furious opposition to this bill, and threw it out." And Horace Walpole adds: "Nor did I ever know how true a votary I was to liberty, till I found I was not one of the number staggered by that speech."*

If the statute of Charles II. conferred no new right upon the subject, but only secured a right already existing, as is said by

* Lord Campbell's Lives of the Chief Justices, Vol. II., pp. 453, 454, and note.

Mr. Chief Justice Taney, and has been said by others, it is quite clear that the common-law right to the writ did not extend to such a case; for while the bill was before the House of Lords, that body proposed ten questions to the Judges, the ninth question being, "Whether the said statute of 31 Car. II., and the several provisions therein made for the immediate awarding and returning the writ of *habeas corpus*, extend to the case of any compelled against his will, in time of peace, to enter into the land or sea service without any color of legal authority, or to any case of imprisonment, detainer, or restraint whatsoever, except cases of commitment or detainer for criminal or supposed criminal matter?"—and the judges who answered, ten in number, were unanimously of opinion that it did not. Mr. Justice Noel, Mr. Justice Wilmot, Mr. Baron Adams, Mr. Baron Smyth, Mr. Baron Legge, Mr. Justice Dennison, and Lord Chief Baron Parker, answered directly in the negative, in the language of the question. The answers of Mr. Justice Bathurst, Mr. Justice Clive, and Lord Chief Justice Willes were, that "the words of the statute, &c., do not extend to such a case." Mr. Justice Bathurst added to his answer: "But in favor of liberty, the judges of the Court of King's Bench have in conformity to that statute extended the same relief to all cases."*

"In a more enlightened age," says Lord Campbell, (to wit, 56 George III.,) "the bill was again introduced, and received unanimous support in both Houses of Parliament." But this act does not provide for liberation from arrest by the military authority in actual service in time of war; nor does the usage of the judges, as mentioned by Mr. Justice Bathurst, appear to have done so.

The remarks, therefore, of Blackstone and Hallam, cited by Chief Justice Taney, are not applicable; and the English history of the writ of *habeas corpus* fails to sustain his opinion with reference to the case before him.

The American cases, although some of them are founded upon a state of facts much more nearly approaching the present case, afford us no satisfactory discussion of the principles which must settle it. They may be found collected in Mr. Hurd's valuable

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* Bacon's Abridgment, Art. *Habeas Corpus*, Editor's note.

treatise on *Habeas Corpus*. Most of them have occurred in time of peace, and did not, therefore, involve the consideration of principles applicable to a state of war.

There have been several cases in Massachusetts in which the writ has issued in time of war to the commanding officer of a fort within the State, for the discharge of minors who had enlisted without the consent of parents or guardians. But the service of the writ seems to have been regarded as a matter of course, and perhaps no reason is to be inferred why it should not have been, as the military force at the place might not have been in such active service as to require a refusal.*

The case which most nearly resembles Merryman's is that of Stacy, which occurred in 1813, in which a *habeas corpus* was, by a commissioner of the Supreme Court of New York, directed to "Isaac Chauncey, Commandant of the Navy of the United States on Lake Ontario, and to Morgan Lewis, commanding the troops of the United States at the station of Sackett's Harbor, and to each and every subordinate officer under the said commandants, or either of them," commanding them to bring before the commissioner the body of Samuel Stacy, Jr., together with the cause, &c.† Morgan Lewis, as general of division in the army of the United States, returned that Stacy was not in his custody. Royal Torrey, Provost Marshal, returned that he held Stacy by virtue of a warrant directed to him by J. Chambers, Assistant Adjutant-General, commanding him to receive Stacy into the custody of the provost guard, from Commodore Chauncey, who charged him with an act of high treason against the United States, committed within the territory of the king of Great Britain. Affidavits were filed, and the commissioner submitted the papers to the Supreme Court for aid and advice. In that court a motion was made for an attachment, or a rule to show cause why an attachment should not be issued, against General Lewis, Torrey, &c. The opinion of the court was delivered by Chief Justice Kent, who said that the return of General Lewis was bad on the face of it; that it was evidently an evasive return; that he ought to have stated, if he meant to excuse himself for the non-production of the body of the party,

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*11 Mass. Rep. 63, 67, 83.

†9 Johns. Rep. 239.

that Stacy was not in his *possession* or *power*. And after examining the evidence tending to show that Stacy was in the custody of General Lewis, and stating that the court was bound to consider the order issued from the Adjutant-General's office and the detention under it as the act of General Lewis, the Chief Justice said that there was apparent on the face of the return a contempt of the process, and that one of the affidavits proved not only that Stacy was in custody under the order and by the authority of General Lewis, but that the direction of the writ was intentionally disregarded, and that the only question that could be made was, whether the motion for an attachment should be granted, or whether there should be a rule upon the party offending to show cause, by the first day of next term, why an attachment should not issue. The conclusion was, an order that an attachment should issue, but should not be served if General Lewis should forthwith, on being served with a copy, discharge Stacy, or cause him to be brought before the commissioner in obedience to the *habeas corpus*.

The only remark which it is necessary to make upon this case, in connection with the present discussion, is, that the attention of the court does not seem to have been directed for an instant to the question whether the existence of the war at that time could have any effect upon the right of the military force to make the arrest, or of the commander to hold the party arrested. And as General Lewis did not claim the right to hold him exempt from the operation of the *habeas corpus*, but made a return to the writ, in the ordinary course, perhaps it may be said that he must be held thereby to have waived any such right, if he possessed it. There can be no doubt that, supposing an exemption from the operation of the *habeas corpus* to exist by reason of the existence of a war, a commanding officer may, in his discretion, waive any right to insist upon the exemption, and yield obedience to the command of the writ, unless controlled by the orders of a superior officer. If a party exempt from the performance of military duty should, notwithstanding, be summoned to the performance of that duty, he may, if he please, waive his right to the exemption.

The high character of the judicial tribunal which passed upon Stacy's case undoubtedly gives a kind of weight even to its omis-

sions; but it is not to be inferred that no distinction exists in respect to the duty of obedience to the writ of *habeas corpus* in time of war and in time of peace, merely because that distinguished tribunal failed to make one, when its attention was called to the subject. If such an inference were drawn, it would cover every case; and yet it is most clear that cases exist in time of war in which a commanding officer is exempt from arrest on civil process, and from any command to produce a prisoner before a judicial tribunal, even when constitutional provisions are found asserting the liberty of the citizen and the supremacy of the civil authority in much more emphatic terms than those cited by Mr. Chief Justice Taney from the Constitution of the United States. One provision of the Constitution of Massachusetts is, that "Every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, and all his possessions. All warrants are contrary to this right, if the cause and foundation of them are not previously supported by oath or affirmation." Another clause declares, that "the military power shall always be held in exact subordination to the civil authority, and be governed by it." Another, that "the power of suspending the laws, or the execution of the laws, ought never to be exercised but by the Legislature, or by authority derived from it," &c. Another, that "no person can in any case be subjected to the law martial, or to any penalties or pains by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by authority of the Legislature." Now whether, consistently with this last provision, any officer acting under the authority of Massachusetts can declare martial law, or whether martial law can exist in connection with any proceedings of the officers of that Commonwealth, while acting under State authority, so as to affect citizens not in the militia or naval service, without an act of the Legislature for the purpose, is a question the discussion of which may be waived at this time, as there is no similar provision in the Constitution of the United States controlling persons acting under that government. But the question whether, in the time of an actual insurrection, and an attempt to quell that insurrection by a military force actually in the field, the commander of the military force, and the officers and men under him, would be subject to all the ordinary civil liabilities

for acts done, to which they would be subject for like acts done in time of peace, is, notwithstanding all these constitutional provisions, another and a very different question. That the military ought always to be subject to the civil power is a general truth applicable to times of peace, but applicable in its full extent only to times of peace. The most ordinary effort of reflection will assure us that in a time of war it has no application to the military power in the field, actively prosecuting the war, even if there is no action of Congress or of the President, under the Constitution of the United States, suspending the writ of *habeas corpus*. On the contrary, thus applied, it would or might be subversive of the efficiency of military operations. It requires but a moderate degree of common sense to arrive at the conclusion, that a commanding general in Massachusetts, marching to the battle-field at the head of his column, in performance of his military duty to suppress an insurrection, is for the time exempt from arrest on civil process, whether the action be in contract or tort. Otherwise the army must stop while the sheriff makes the arrest and the general gives bail; but in the mean time the insurrectionists may attack and rout his forces, who are waiting for the execution of the bail-bond.

It may perhaps be argued, that there is no legal exemption in such cases, but that no arrest could be made because the commanding officer would resist; and although the resistance would be unlawful, yet no jury could ever be found which would give more than nominal damages. But if it be true that there is no exemption from the arrest, it would be the duty of the commander to submit to it; the resistance would be the obstruction of an officer in the execution of his duty, subjecting the party to indictment; and, moreover, the sheriff who attempted to make the arrest might summon the *posse comitatus*, and thereupon insist that the general should give bail, and answer also to a complaint for resisting the arrest; or else he must fight the *posse* before he could be permitted to fight the insurrectionists.

To talk of a duty to suspend the military operations, submit to an arrest, and give bail under such circumstances, is sheer nonsense. It is clear that the officer, being in duty bound to the State and the people to perform the military service upon which perhaps

the fate of the government was depending for the time being, could not consistently be held to be a wrong-doer for persisting in the performance of that as the superior duty. The civil responsibility to arrest must be held by any court giving a reasonable construction to the Constitution and to the law, as suspended for the time being by the paramount military obligation. In other words, the military law must be held to supersede the civil in that exigency, and this in consistency with, and not in antagonism to, the Constitution.

Still more clear must it be to the most indifferent comprehension, that the commander of a column, thus marching to battle against insurgents, is not bound to encamp his men, and in obedience to the command of a writ of *habeas corpus*, to repair forthwith to the court-house, wherever that may be, or to a judge's chamber if that be the place selected, taking with him a soldier, whose friends, anxious lest he should be killed in the encounter, have procured the writ upon the ground that he is a minor, and his enlistment into the service illegal and void, and that the order of the commanding officer requiring him to march to the battle is an unlawful duress and detention, he having previously requested a discharge. An examination of the case might require two or three days. The party who should procure such a writ, and attempt thereby to suspend the military operations, would be loaded with execrations; and the general who, under such circumstances, should yield obedience to it, would be deservedly cashiered. But if the civil responsibilities existed as in time of peace, the refusal to make a return would be a contempt of court, for which an attachment should issue; and the general should be arrested, taken before the judge, and fined, perhaps imprisoned. If we find no special exemption from the operation of the civil process in such case in the Constitution or laws of the State, the exemption will rest, not merely upon the fact that the commander would assuredly forthwith use his military power to prevent the attachment, but upon the military responsibility which then rests upon him, and the military law by which he is governed under the Constitution, altogether inconsistent with, and superseding, the civil responsibility.

But it is not sufficient that we reach the conclusion by intuition, as it were, in cases of such an extreme character. The inquiry

presents itself—How far does the principle apply upon which this exemption from civil responsibility rests? The cases which have occurred, and which are likely to occur hereafter, are not cases of an attempt to serve the writ of *habeas corpus* on the actual battle-field, or on the immediate march to it.

If, in discussing the principles involved in the subject, we turn to the early history of the *habeas corpus* in this country, we find very little to aid us in our investigation. The American Colonists generally claimed all the liberties and privileges of natural-born subjects of the realm, and the benefit of the common law for the vindication of those liberties, as a part of their birthright. There is nothing, however, to be found respecting this writ in their earlier history which can render us any service.

In 1689, an application to Judge Dudley in Massachusetts for the writ was "arbitrarily refused," which denial was made the subject of a subsequent suit against the judge.* A pamphlet was published in Boston during that year, in which the denial of the writ was alleged as one of the grievances of the people. In 1692 an act was passed by the Assembly for the better securing of the liberty of the subject and the prevention of illegal imprisonment, which regulated proceedings on the writ.

About the same time the Assembly of South Carolina adopted the Act of 31 Charles II., it would seem for the especial benefit of the pirates who were then in the habit of settling in that State, and who, making themselves friends of the mammon of unrighteousness which they had acquired, procured the passage of the act as a protection against the Proprietary government, which was desirous of punishing them for their piracy.†

After the year 1700 there is evidence of the use of the writ from time to time in several of the Colonies. Instances are collected in Mr. Hurd's treatise, but we have found no case in Colonial history were there was a question respecting its application to military operations in time of war.

The denial or suspension of the writ is not alleged, in terms, in the Declaration of Independence, as one of the grievances of the Colonies; but "transportation beyond the seas, to be tried for

* Washburn's Judicial History of Massachusetts, p. 106.
† Hurd's Habeas Corpus, p. 111; Hewitt's History of S. Carolina, pp. 115-117.

offences," is in the enumeration; and the abolition "of the free system of the English laws in the neighboring Province, establishing therein an arbitrary government and enlarging its boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies," which is the next charge in the Declaration, refers, it is understood, to an act making more effectual provision for the government of the Province of Quebec, passed by Parliament in 1774, and which was opposed in the House of Commons because it left the inhabitants under the civil law of France, denying them the right of trial by jury, the writ of *habeas corpus*, &c.*

There seems to be little in the ante-Revolutionary history, therefore, which can serve to give a construction to the provision in the Constitution of the United States which has recently become the subject of so much comment. The debates upon the Quebec Bill may have had some influence in producing it; but an act of Parliament, passed in 1777, may have had a more direct effect. That act recited that rebellion and war had been traitorously levied and carried on in certain of his Majesty's Colonies in America, and that acts of treason and piracy had been committed on the high seas; that many persons had been seized and taken who were expressly charged, or strongly suspected, of such treasons and felonies; and that it might be inconvenient to proceed forthwith to the trial of them, and at the same time of evil example to suffer them to go at large;—and thereupon it was enacted, that all such persons, committed by any magistrate having competent authority in that behalf, should be detained in safe custody, without bail or mainprise, until the first day of January, 1778; and that no judge or justice should bail or try any such person until that date, without an order from the Privy Council. The fourth section confined it to acts committed without the realm.†

The original motion which gave rise to the clause in the Constitution was made by Mr. Charles Pinkney of South Carolina, but his proposition was amended on motion of Mr. Gouverneur Morris.‡

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* Hurd, p. 119. † Statutes at Large, 17 Geo. III. chap. 9.
‡ 3 Madison Papers, 1365, 1441.

The constitutional provision, instead of settling anything upon the subject, except a restriction of the power of suspension to two occasions, has introduced a new element of uncertainty, by raising a question whether suspension of the writ (which the clause, by implication, admits may exist) may be made or authorized by the President, or whether the power of suspension is confined to Congress alone. This question may involve another, to wit, whether the suspension is a denial of the writ itself, so that it cannot be issued during the term of the suspension; or whether it is merely an authority, in some way existing, permitting persons accused of certain classes of offences to be held against the operation of the writ when issued, so that a return that the party is committed or held on an accusation of such offence, if true in point of fact, will be a bar to further proceedings upon the writ. If it were the first, as the term "suspension" might seem to indicate, then it would be clear that the suspension which is thus restricted could be made only by Congress; for from the nature of the case no power could exist forbidding the writ to issue, except in Congress. It would require an act of legislation. If, on the other hand, the suspension which is thus restricted is only an authority to hold a person arrested, against the operation of the writ, so that the party to whom it is directed is not bound to produce the prisoner according to its command, and may by a return show that he is not bound to produce him, or may refuse to produce him without a return, then the suspension may not only not require a legislative act in certain cases, but it may result from circumstances, without any act, legislative or otherwise, declaring a suspension. There seems to be no reasonable doubt that the suspension referred to in the Constitution is of this character, and not a prohibition of the issue of the writ. It is believed that the acts of Parliament which are known as suspensions of the *habeas corpus* do not purport to forbid the issue of the writ, or authorize a denial of it. Mr. Hurd* speaks of the statute 17 George III. chap. 9, as an act by which the writ of *habeas corpus* was denied, but it did not restrain the issue of it; and the act of 34 George III. chap. 54, referred to in Bacon,† only provided that persons detained for high treason, &c. might be held in

* Habeas Corpus, p. 132. † Abridgment, Tit. *Habeas Corpus*, B. 4, note.

custody without bail or mainprise until a certain day, and that no judge should bail or try a person so committed without an order from the Privy Council. It also suspended an act for preventing wrong imprisonment.

Now it is to be noted, that the *constitutional provision is not a grant of power*, but a restriction upon a power assumed to exist, and the exercise of which is to be limited; without any assertion or assumption when it exists, by whom it may be exercised, or under what circumstances it might be exercised but for the restriction and limitation. By whatever body or person, or under whatever circumstances, the *habeas corpus* might have been suspended but for this constitutional limitation, by that body or person, and under those circumstances, it may still be suspended in time of rebellion or invasion; but by no body or person, nor under any circumstances, can it be suspended by means of any authority emanating from the United States, at any other time than when there is either rebellion or invasion, and the public safety requires it.

This distinction between a grant of power and a restriction upon a power has not been sufficiently adverted to in some of the discussions upon the subject. Mr. Chief Justice Taney himself treats the constitutional provision as a grant of power. He says, "The clause in the Constitution which *authorizes* the *suspension* of the privilege of the writ of *habeas corpus* is in the ninth section of the first article;" and as the provisions of that article relate mainly to Congress, he argues that the authority to suspend is conferred on Congress alone. Then he says: "It is the second article of the Constitution which provides for the organization of the Executive Department, and enumerates the powers conferred on it and prescribes its duties. And if the high power over the liberty of the citizens, now claimed, was intended to be conferred on the President, it would undoubtedly be found in plain words in this article." Whereas, in truth, the Constitution did not intend to confer, in terms, any power to grant the writ of *habeas corpus*, nor any power to suspend it, but left the power to grant and the power to suspend to be settled by general principles, with the single exception of a limitation upon the power of suspension to the two exigencies which it specified.

There is therefore no question whether the Constitution, in the clause mentioned, confers the power of suspension upon Congress alone, or whether it gives it to the President also; for it gives it to neither. The power exists as an incident to other powers expressly conferred. That it is thus given as an incident is clear from the restriction itself, which would otherwise be wholly nugatory; for a restraint upon a power is in itself in no sense a grant of the power upon which the restraint is imposed. Congress possesses the power to suspend the *habeas corpus*, as an incident to its power to suppress an insurrection, and as an incident to its power to make war, because a suspension may be made by a legislative act; and but for the restriction, Congress might suspend it in case of war when there was no invasion of the United States. Whether the President possesses the power to order or authorize it, as an incident to his office as commander-in-chief of the army and navy, or whether he has it as an incident to his duty to see the laws faithfully executed, we do not propose to inquire. The opinion of the learned Attorney-General upon the latter point is already before the public, and we do not deem the settlement of those questions necessary to our present purpose.

Taking the constitutional provision as a clause of restraint, the inquiry which is presented to us is, under what circumstances, upon the more general principles of law, may there lawfully be a refusal to produce, in obedience to the writ of *habeas corpus*, a person detained or imprisoned in time of rebellion or invasion. Starting, as Mr. Chief Justice Taney did, with the grave error in his premises of supposing a restraint upon a power to be a grant of it, it is not surprising that he did not reach any right conclusion upon this subject. It would have been wonderful had he done so.

Upon the inquiry thus indicated, our first proposition is, that in time of actual war, whether foreign or domestic, there may be justifiable refusals to obey the command of the writ, without any act of Congress, or any order or authorization of the President, or any State legislation for that purpose; and the principle upon which such cases are based is, that the existence of martial law, so far as the operation of that law extends, is, *ipso facto*, a suspension of the writ.

The existence of martial law and the suspension of the *habeas corpus* have been said to be one and the same thing; but in fact the former includes the latter, and much more. Wherever that law exists, searches and seizures may be made without warrant, and persons may be arrested without process. The search, seizure, and arrest give no cause of action. The detention, unless there is an abuse, furnishes no claim for damages against the officer who enforces it.

The case Luther *vs* Borden and others* covers this whole ground. That case, it is familiary known, arose out of an attempt to change the government of Rhode Island, and was an action of trespass for assault and false imprisonment, brought for breaking and entering the plaintiff's house with an armed force, and taking and holding him as a prisoner. The defendants offered several pleas in justification, setting forth in substance the existence of an insurrection to overthrow the government of the State by military force,—that at the time of the alleged trespasses the State was under martial law, declared by the General Assembly in defence of the government,—that the plaintiff was aiding and abetting the insurrection, and the defendants, being enrolled in a certain company of infantry, were ordered to arrest the plaintiff, and if necessary to break and enter his dwelling-house for that purpose,—that it was necessary, and thereupon they did break and enter, and search his house, doing as little injury as possible, &c. The action was designed not merely for the private remedy, but to test the questions which arose between the two political parties. Mr. Chief Justice Taney then said, speaking of the state of affairs in Rhode Island (where, by the way, armed collision was only threatened, without an actual conflict of the opposing forces):—

"In relation to the act of the Legislature declaring martial law, it is not necessary in the case before us to inquire to what extent, nor under what circumstances, that power may be exercised by a State. Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet the

* 7 Howard's Supreme Court Reports, 1.

peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the State authorities. And unquestionably a State may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable and so ramified throughout the State as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority.

"It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things the officers engaged in its military service might lawfully arrest any one who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection, and might order a house to be entered and searched, where there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it."

He added:—

"No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purpose of oppression, or any injury wilfully done to person or property, the party by whom or by whose order it is committed would undoubtedly be answerable."

This last is but the application of the ordinary principles of law to cases of the abuse of powers conferred by law.

Now it is quite clear that if a state of war and the existence of martial law will authorize the officers engaged in the military service to break open and search a house where there is reason to suppose that a person, whom they have reasonable grounds to believe was engaged in an insurrection, is concealed, and to arrest him if found, without any warrant from a magistrate for that purpose, *a fortiori* they may hold him after his arrest against any civil process issued for his liberation. The law of the arrest is the law of the detention, and the *habeas corpus* is suspended so far

that no return to the writ can be required of the officer who holds the prisoner under the law which authorized the arrest. To say that the military authorities had a right without warrant to break and enter what in time of peace is denominated a man's castle, and that they may without warrant lawfully arrest any one, on reasonable information that he was engaged in the insurrection, and then to hold that the authority thus making the arrest was bound thereupon to obey the writ of *habeas corpus* and bring the party before a magistrate, on the ground that the arrest and imprisonment were unlawful, and that he was entitled to his discharge forthwith, because the arrest and detention *were thus without a civil warrant*, would be an inconsistency and absurdity of which Mr. Chief Justice Taney could hardly be guilty when he put *this* and *that* together. And yet he relies upon the constitutional provision that no person can be arrested without warrant, to show that Merryman ought to have been brought before him, and that he was entitled to be discharged.

If, therefore, Merryman's arrest or detention was under martial law, then, on the principle enunciated by the Chief Justice, as the organ of the court, in Luther *vs.* Borden, the arrest or imprisonment cannot be declared to be unlawful.

Before proceeding to inquire whether martial law was actually in existence at Fort McHenry when the Chief Justice issued the writ requiring General Cadwalader to produce the body of Merryman before him, and to make return of the cause of his detention, it may be well to dispose of two or three incidental questions.

Supposing martial law to have been in existence at the time, and that General Cadwalader held Merryman lawfully under it, was not the General bound to make his appearance before the Chief Justice, with his prisoner, and to make a return according to the requirement of the writ of *habeas corpus*, so that it might appear to the civil authority that the prisoner had been arrested, and was held, under martial law? So far from this being true, we are of opinion that it may safely be asserted that, if the prisoner was actually held under martial law when the writ was issued, the military commander who was then authorized to enforce martial law, and was himself subject to it, was not bound to obey the writ, even supposing the arrest and the imprisonment to have been so far

unlawful that an action would lie to recover damages for an abuse of the power under which the arrest and detention were had.

The right to a remedy in damages would not interfere with the due maintenance and execution of martial law, if there was no attempt to enforce it by an arrest of the military officer while in the execution of his military office; which, if attempted, might, as we have seen, raise another question. But it seems to be perfectly clear that the party holding a prisoner under martial law cannot be required to bring him up for an examination under the municipal law. If he might be, then, in the language of Mr. Chief Justice Taney, in Luther *vs.* Borden, before cited, "martial law and the military array of the government would be mere parade, and rather encourage attack than repel it." Let us test this. It will not be denied, we presume, that it is one of the first duties of a military commander in time of war, if not the very first, to hold the post and perform the military duty assigned to him, and to keep watch and ward, not only that there may be no detriment to the service by open assault of the public enemy, or by secret plots of concealed traitors, but to make sure that the troops under him, with the material of war intrusted to his care and management, are at all times in readiness for such service as may be required of him by the orders of his superior officers, or by the exigencies of the public service if he have a separate, independent command. If he is a subordinate officer, he cannot, according to the law which ordinarily governs him, leave the post he is ordered to occupy and hold, without a military order for that purpose, upon the penalty denounced by that law; and that penalty may be death itself. Now the question comes, May the command of the civil process justify him in abandoning the duty with which he is thus intrusted, or in committing it to other parties for the time being, in order that he may attend court? If the military law which governs him is martial law, it is very clear that he cannot justify or excuse his absence from his post on such a command; for if martial law, when it is in existence, supersedes the civil law, as we have seen from the opinion of Mr. Chief Justice Taney that it does, and as it evidently must do, then "it follows, as the night the day," that no command of any civil officer, requiring a commander to leave his post and violate his military obligation, could impose any duty

upon him. As we have said, an officer in an independent command might exercise a discretion on the subject; but that is not material to the argument.

It appears in the opinion of the Chief Justice that the application for the *habeas corpus* was made to him while in Washington, under the impression that he would order the prisoner to be brought before him there; but as Merryman was confined at Fort McHenry, within his circuit, he resolved to hear the case at Baltimore, "*as obedience to the writ, under such circumstances, would not withdraw General Cadwalader, who had him in charge, from the limits of his military command.*" The Chief Justice very coolly puts this as a matter of discretion, and as if he might be entitled to some credit for not requiring the General to absent himself from the limits of his military command in time of war, thereby superseding him for the time being, depriving the military arm of the country of the service of an officer of such high grade, who had command of a district which required sleepless and untiring vigilance for the preservation of order; without once considering the consequences which might have resulted had he thus required the officer to leave his post, to repair with his prisoner to a place outside of his military district, and there to remain with the prisoner until the lawyers could argue the case, and a decision could be made. If a thought had been given to that matter, it might have led to the inquiry, how far, upon general principles, without any legislative suspension or any formal declaration of martial law, the writ of *habeas corpus* can penetrate a military camp, in time of war, and arrest the whole military operations of the government at that place.

If Mr. Chief Justice Taney could thus have required the attendance of General Cadwalader at Washington, Mr. Justice Catron, if the insurgents had not driven him from Tennessee, might require the general in command at St. Louis to repair to Nashville, bring with him the body of any person taken in Missouri in arms against the government, and there show cause why he holds him as a prisoner. If there were any other Confederate General than Pillow threatening to come up the Mississippi, the idea of such a legal power at the time we are writing would be perfectly preposterous.

If such might be the consequences of the propositions laid down by Mr. Chief Justice Taney, the judicial power may be made quite as effectual to overthrow the government in time of war as the suspension of the *habeas corpus*, by order of the President, in time of peace, could be to overthrow the liberties of the people,—somewhat more so, indeed, as the effect of the latter could be more readily and securely avoided. Judge Catron may probably make his peace with the insurgents, if he will take his stand at Nashville, issue the writ, and cause it to be obeyed.

But it may be urged, that the return to the writ in Merryman's case, so far as there was a return, was that the President had suspended the *habeas corpus*, or had authorized General Cadwalader to suspend it; that, if neither of them had power to do so, there was nothing to show the existence of martial law, or any impediment to the full operation of the writ; and that it is necessary, therefore, to establish the power of the President in the case.

To this it may be answered, that the Chief Justice had knowledge of the existence of war. That was a fact which did not require proof before him. He was bound to take judicial notice of the President's proclamation. If, without further proof than was then before him, he could not judicially know, also, that troops from Massachusetts and from Pennsylvania, hastening to the relief of the capital, had been assailed in the very city where he was proposing to bring up the prisoner, he was not bound to ignore that fact, but might well, upon such knowledge as he must undoubtedly have had in common with the rest of the community, have made an inquiry whether there had not been an actual armed collision, by which several persons had been killed, and troops from Pennsylvania turned back, showing a state of insurrectionary violence; for, although this collision was brought on by the irregular force of a mob, the evidence before him, and on which he assumes to found his opinion, might have shown him that this violence of the mob was in fact insurrectionary, as is abundantly shown by the destruction of the bridges and railroads for the purpose of preventing more troops from reaching the capital. It was for the destruction of the bridges with this intent, among other things, that the prisoner, Merryman, was arrested. If the judicial mind of the Chief Justice required more formal evidence of these matters, it could readily

have been furnished. But this is not material, for the Chief Justice knew, from the evidence before him, that Merryman was held by a military power called out for the purpose of suppressing the insurrection against the government, and that he was held in a military fortress belonging to the government, and then occupied by the military forces of the government, for the purpose of resisting and quelling this insurrection. He sent his writ to the fort, directed to the general, who, as he understood, commanded the military district,—a district which had been created by reason of the insurrection, and a general who had been called into service for the very purpose above mentioned; and if martial law existed at the time and place, from general principles of law applicable to such a condition of things, the Chief Justice was bound to take judicial notice of that fact without further evidence.

This brings us to the question, Was martial law in existence at Fort McHenry at the time when the writ was issued and the return made? In order to determine this question, we inquire, What is martial law? It is said that there is a distinction between military law and martial law. Undoubtedly there is to this extent, that military law is for the government of the military force, and does not necessarily imply the existence of martial law. Military law may and does exist in time of peace, for the government of the army; but martial law includes military law, and it exists only in time of war. The Duke of Wellington is quoted as having said, that "martial law is the will of the commander-in-chief," and Blackstone says it "is built upon no settled principles, but is entirely arbitrary in its decisions." With such a scope and extent it cannot exist in this country consistently with the Constitution, for it would be utterly subversive of the Constitution for the time being. Neither the President nor Congress can constitutionally proclaim or authorize such a power, nor can it exist by the general principles of law. Burrill, in his Dictionary, defines it as "An arbitrary kind of law or rule sometimes established in a place or district occupied or controlled by an armed force, by which the civil authority and the ordinary administration of the law are either wholly suspended or subjected to military power." This is founded upon the idea of Blackstone, and is clearly imperfect as a definition, unless the military power which exercises this law or rule is not responsible to

the civil authority in any mode for the manner of its exercise; which in this country is clearly contrary to the fact. It has been said, that it is "founded upon a paramount necessity." Of course, then, it extends as far as the necessity extends, and no further. It may be that in certain cases the military authority must judge of the military exigency, so that its determination whether the military necessity exists will be conclusive; but still the power will be restricted to the scope of the necessity which it has been determined exists, so that if an arbitrary force is used, having no connection with the exigency, or not within the possible scope of the necessity, the party guilty of it will be civilly responsible for his acts.

If the military commander should depart from the possible scope of the military necessity, and commit a private wrong, disconnected from it, as for instance a personal assault to gratify private revenge, the existence of martial law would not excuse him from punishment afterward by a judicial tribunal. So if, under pretence of the exercise of martial law, he should be guilty of unnecessary force or oppression, showing an abuse of the power demanded by the military necessity. This is substantially the principle laid down in Luther *vs.* Borden, where the court say: "No more force can be used than is necessary to accomplish the object, and if the power is exercised for the purposes of oppression, or any injury wilfully done to person or property, the party by whom or by whose order it is committed would undoubtedly be answerable."

Martial law, then, is that military rule and authority which exists in time of war, and is conferred by the laws of war, in relation to persons and things under and within the scope of active military operations in carrying on the war, and which extinguishes or suspends civil rights, and the remedies founded upon them, for the time being, so far as it may appear to be necessary in order to the full accomplishment of the purposes of the war; the party who exercises it being liable in an action for any abuse of the authority thus conferred. It is the application of military government—the government of force—to persons and property within the scope of it, according to the laws and usages of war, to the exclusion of the municipal government, in all respects where the latter would impair the efficiency of military rule and military action.

Founded upon the necessities of war, and limited by those necessities, its existence does not necessarily suspend all civil proceedings. Contracts may still be made, and be valid, so long as they do not interfere with or affect the military operations. A mere tresspass by A. upon the land of B., unconnected with military service, is none the less a tresspass, and does not require a military trial or determination. The courts are not necessarily closed, for all actions relating merely to the private affairs of individuals may still be entertained without detriment to the public service; but it closes the consideration there of any action, suit, or proceeding in which the civil process would impair the efficiency of the military force. Chief Justice Taney's court might be open, but he could not subject General Cadwalader to any civil duty which conflicted with his military duty.

We shall ascertain its extent in some measure if we inquire, What are the rights and usages of war under which, according to the opinion of the court in Luther *vs.* Borden, the government, in order to maintain itself, and to overcome the unlawful opposition, may lawfully arrest persons without warrant, and for this purpose may forcibly enter a house on suspicion that a person engaged in the insurrection is concealed there? What are the rights and usages of war according to which persons may be seized and held because the public safety requires it—or because the conduct of the enemy requires that hostages be taken—or according to which persons may be impressed, for the time being, into the military service, and required to perform military duty--or property may be destroyed, or seized and used for the military service, without the assent of the owner? If such rights and usages might exist without the existence of martial law, they would be sufficient for our present purpose; for when such rights exist, we have already shown that the *habeas corpus* is necessarily suspended. But the existence of such rights seem to indicate with precision the existence of martial law.

A question has arisen whether a commanding general can, by proclamation of martial law, give force to this military rule beyond the limits of his camp, or of the military position occupied by him. Mr. Justice Woodbury, in Luther *vs.* Borden, expressed the opinion that he might do so over a space near the field of his ope-

rations.* And it is well known that other very distinguished gentlemen have entertained like opinions, or perhaps those giving the proclamation a greater territorial operation.

Now it may, we think, be laid down as a safe principle, that in time of war any fort or camp occupied by a military force, for the purposes of the war, is *ipso facto*, without any special proclamation, under the government of martial law, such as we have described it. And the same, in our opinion as at present advised, is equally true of any column of soldiers mustered into active service for the like purpose, whether on the march or at rest. It is not necessary to speak of soldiers mustered into the service of the government, but stationed at a distance for the purpose of being called into active service when occasion may require. They may, or they may not, be under the government of military law only, as in time of peace. But this cannot be said of troops actively engaged in the service of the government. Whether those troops are in the face of the enemy, in battle array, or whether they are merely garrisoning a fort to aid thereby in suppressing a rebellion, or whether they are opening and holding the avenues by which the passage of other troops to the theatre of active war is to be facilitated, the law which governs the place where they are is martial, and not municipal. This is necessary to enable the government to use the military force efficiently, and also for the protection of the officers and soldiers.

There are very respectable authorities which tend to support this position, although we admit that the subject has not been very fully discussed.

We, refer in the first place, to a speech of Mr. John Quincy Adams in the House of Representatives, on the 14th and 15th of April, 1842, which was reported in the National Intelligencer, April 16th and 19th, and afterward printed in pamphlet form at the Emancipator office, in Boston. Upon a motion to strike out so much of an appropriation bill as related to the salary of a minister to Mexico, and a motion to amend that amendment by reducing the appropriation for the missions to Austria and Prussia one half, the debate, as usual, ran off into topics having no connection

* 7 Howard's Rep. 83.

whatever with the subject nominally under consideration, and, among other matters, into the consideration of the emancipation of slaves. Mr. Adams said:

"When your country is actually at war, whether it be a war of invasion or a war of insurrection, Congress has power to carry on the war, and must carry it on according to the laws of war; and by the laws of war an invaded country has all its laws and municipal institutions swept by the board, and martial law takes the place of them. This power in Congress has, perhaps, never been called into exercise under the present Constitution of the United States. But when laws of war are in force, what, I ask, is one of those laws? It is this: that when a country is invaded, and two hostile armies are set in martial array, the commanders of both armies have power to emancipate all the slaves in the invaded territory. Nor is this a mere theoretic statement. The history of South America shows that the doctrine has been carried into practical execution within the last thirty years.....And here I recur again to the example of General Jackson. What are you now about in Congress? You are about passing a grant to refund to General Jackson the amount of a certain fine imposed upon him by a judge under the laws of the State of Louisiana. You are going to refund him the money, with interest; and this you are going to do because the imposition of the fine was unjust. And why was it unjust? Because General Jackson was acting under the laws of war, and because *the moment you place a military commander in a district which is the theatre of war, the laws of war apply to that district*.....I might furnish a thousand proofs to show that the pretensions of gentlemen to the sanctity of their municipal institutions under a state of *actual invasion and of actual war, whether servile, civil, or foreign*, is wholly unfounded, and that the laws of war do in all such cases take the precedence. *I lay this down as the law of nations.* I say that the military authority takes, for the time, the place of all municipal institutions, and slavery among the rest. I am open to conviction, but until that conviction comes, I put it forth, not as a dictate of feeling, but as a settled maxim of the laws of nations, that in such a case the military supersedes the civil power."

A writer of several articles published in the Louisville Journal, and afterward collected in a pamphlet,—who admitted that he had, up to the time of writing, "supposed that, in the estimation of all intelligent men in this country, martial law stood upon the precise same footing, and none other, as Lynch law, Regulators' law, or

mob law," and who said that "in a legal or moral sense they all have the precise same basis," and that "they are equally the same arbitrary usurpation of power, without a particle of law or right to sustain either,"—denounced Mr. Adams' speech, and the speeches also of Mr. Buchanan and Mr. Berrien upon the question of remitting General Jackson's fine, in very strong terms; asserting that the doctrine "promulged" was, that martial law is "a law paramount to the Constitution itself,—a law which sweeps the Constitution and all other civil law by the board, and leaves the property, the liberty, and the life of every citizen at the will of a military despot."

In a subsequent debate in the House, January 5, 1843, Mr. Adams referred to this pamphlet, and said that in it he was charged with having given an opinion in relation to the power of a commanding general to declare martial law that was utterly at variance with freedom and the laws of nations, and he wished to have an opportunity of answering that charge. He wished to have an opportunity to explain and defend the opinions he had given. But the debate was continued, so far as we are aware, without the desired defence and explanation.

Mr. Berrien is reported to have said, that "General Jackson was perfectly excusable, under all the circumstances of the case, in declaring martial law, and that he was equally excusable in disobeying the writ of *habeas corpus*.

Mr. Justice Woodbury, in the dissenting opinion delivered by him in Luther *vs.* Borden, while taking a different view of martial law from that adopted by a majority of the court, and denying the authority of the Legislature of Rhode Island to declare martial law under the existing circumstances, said:

"The necessities of foreign war, it is conceded, sometimes impart great powers as to both things and persons. But they are modified by those necessities, and subjected to numerous regulations of national law and justice and humanity. These, when they exist in modern times, while allowing the persons who conduct war some necessary authority of an extraordinary character, must limit, control, and make its exercise, under certain circumstances, and in a certain manner, justifiable or void, with almost as much certainty and clearness as any provisions concerning

municipal authority or duty. So may it be in some extreme stages of civil war. Among these, my impression is that a state of war, whether foreign or domestic, may exist, in the great perils of which it is competent, under its rights and on principles of national law, for a commanding officer of troops under the controlling government to extend certain rights of war, not only over his camp, but its environs and the near field of his military operations. (6 American Archives, 186.) But no further, nor wider. (Johnson *vs.* Davis et al., 3 Martin, 530, 551.) On this rested the justification of one of the great commanders of this country and of the age, in a transaction so well known at New Orleans.

"But in civil strife they are not to extend beyond the place where insurrection exists (3 Martin, 551); nor to portions of the State remote from the scene of military operations, nor after the resistance is over, nor to persons not connected with it (Grant *vs.* Gould et al., 2 Hen. Bl. 69); nor even within the scene can they extend to the person or property of citizens against whom no probable cause exists which may justify it (Sutton *vs.* Johnson, 1 D. and E. 549); nor to the property of any person without necessity or civil precept. If matters in this case had reached such a crisis, and had so been recognized by the General Government, or if such a state of things could and did exist as to warrant such a measure independent of that government, and it was properly pleaded, the defendants might perhaps be justified within those limits, and under such orders, in making search for an offender or an opposing combatant, and, under some circumstances, in breaking into houses for his arrest."*

In the closing part of his opinion, he says :—

"And though it is very doubtful whether in any other view, as by the general rights of war, these respondents can justify their conduct on the facts now before us, yet they should be allowed an opportunity for it."

It is quite clear, therefore, that the learned judge recognized "*certain general rights of war*," under which parties would be justified in making searches and seizures without warrant, and in breaking into houses for that purpose. The limitations which he suggests would to a great extent defeat the right, unless the judgment of the military authority respecting the existence of the exigency in which the right may be exerted is to be held conclusive on that point. To submit that question, in all cases, to the subsequent determination of a jury, would not be consistent with

* 7 Howard's Rep. 83.

the principle upon which the right is founded,—which must be the existence of a rule superseding the municipal law in the particular case, which rule is martial law.

The personal irresponsibility of officers and soldiers for acts which would in time of peace be trespasses upon other persons will serve to show the existence of martial law; for the irresponsibility can be sustained only on the laws of war. The existence of martial law formed, as we have seen, the justification of the defendants in Luther *vs.* Borden, for breaking the house and seizing and holding the plaintiff without warrant. It was the only justification.

To state the question, then, in another form, How far does this personal irresponsibility or justification extend in such cases? Upon this question, undoubtedly, opinions have not been uniform.

We believe it to be a sound principle, that, in time of war, every soldier mustered for the active purposes of the war, whether in fort, camp, or column, is bound to yield implicit obedience to any command of his superior which may be within the scope of the military service due from him, without any inquiry whether such command would be justifiable according to the rules of the municipal law; and he is excused from civil responsibility for the performance of the act required, because of this obligation. Our principle, of course, does not embrace acts required and done which are entirely aside from his military duties.

It must be admitted that the writer in the Louisville Journal, to whose articles we have referred, does not sustain our proposition. He says:—

"We are told of two cases of the violation of law and private right by Washington, at the siege of York, as the two greatest, if not the only, instances of the usurpation of power by him during the whole of the Revolutionary war. They will serve as examples to elucidate the subject, verging as they do to the very utmost limit of what an officer may do, and stand morally excused, without being excused by the law. One was the demolition of a house that stood in the way of his approaches to the works of the enemy, and the other authorizing the seizure of some cattle, indispensable to the sustenance of his army. Both were, even strictly speaking, necessary violations of law and private right, but no otherwise so,

except in a moral sense, than if the same things had been done by a private individual. Legally speaking, the acts derived no validity from the facts of their having been done by a military commander under circumstances of the most urgent State necessity. He, no doubt, would voluntarily have made good the damage out of his own pocket, if redress could have been had in no other way; but he could have been compelled to do so in a court of law. The circumstances attending the acts would have aided his defence no otherwise than to prevent the jury from giving what is termed smart-money. If he had sold the cattle or bartered them for other provisions, he would not have transferred the title; but the owner could still have recovered them from whomsoever he might have found in possession. If the owner had resisted, and killed the officer making the seizure, it would have been justifiable homicide; if the officer had killed him, it would have been murder."

Such doctrine needs no other refutation than its evident absurdity. If General Washington was a trespasser in ordering the acts thus specified, every private soldier who assisted in the performance of the service was equally so; for the command to commit a trespass affords no justification for the act. Such is the general principle, and the principle was applied in Mitchell *vs.* Harmony, 13 Howard's Rep. 115.

The opinion of the Supreme Court of New York in the case of McLeod, even supposing it to be sound, does not conflict with our position. McLeod, who was a subject of the Queen of Great Britain, residing in Canada, was arrested in New York, charged with the murder of Durfee, who was killed at the time of the destruction of the steamer Caroline, on the American side of the Niagara River, in December, 1837, because, as was alleged, she was employed in aiding the rebels in Canada, by carrying military stores to Navy Island. He was brought up on *habeas corpus*, in 1841, and his discharge was moved, among other reasons, because the attack on the Caroline was an act of public force, committed by command of the British Government, all the defendant did being by the command of his superior officer, and in obedience to his own government; and because for acts done under such authority he was not responsible, personally and individually, in any court of law whatever. The court refused to discharge or bail him, holding that he was liable to be proceeded against

individually in the criminal courts of New York for arson and murder.* The soundness of the opinion was impunged by Mr. Webster, then Secretary of State,† and by other distinguished jurists; and it was controverted in a very able review by Judge Talmadge. But supposing it to be beyond question, the grounds upon which the court in New York proceeded were, that a nation can exercise the right of war only within its own territory, or that of its enemy, or in one which is vacant; that an order of a nation at war, for the destruction of life or property of its enemy within the territory of a neutral power is void, and affords no protection to persons acting under it; and that a sovereign has no right to compel his subject to enter a neighboring country and commit any unlawful act, whether in peace or war.‡

The case Elphinstone *vs.* Bedreechund§ is not precisely to the point, but it may serve to illustrate the subject. The marginal abstract of it as follows:

"The members of the provisional government of a recently conquered country seized the property of a native of the conquered country who had been refused the benefit of the articles of capitulation of a fortress, of which he was governor, but who had been permitted to reside under military surveillance in his own house in the city in which the seizure was made, and which was at a distance from the scene of actual hostilities. *Held*, that the seizure must be regarded in the light of a hostile seizure, and that a municipal court had no jurisdiction on the subject.

"*Semble*,—The circumstances, that at the time of the seizure the city where it was made had been for some months previously in the undisturbed possession of the provisional government, and that courts of justice under the authority of that government were sitting in it for the administration of justice, do not alter the character of the transaction."

In the course of the argument the Attorney-General, Sir James Scarlett, said:—

"It is unnecessary to refer to any decisions upon the law of England, or any modern jurists, to illustrate the position, that in a state resulting from a state of war, if property is seized under an erroneous supposition that it

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* 25 Wendell's Rep. 483; 1 Hill's N. Y. Rep. 377. † 25 Wendell's Rep. 512, note.
‡ 1 Hill's Rep. 378. § 1 Knapp's Reports of Cases before the Privy Council, 316.

belongs to the enemy, it may be liberated by the proper authority, but no action can be maintained against the party who has taken it in a court of law. If our English naval commander seizes property as enemies' property, that turns out clearly to be British property, he forfeits his prize in the Court of Admiralty, and that court awards the return of it to the party from whom it was taken; but the case of Le Caux *vs.* Eden (Douglas, 573) decides the question that no British subject can maintain an action against the captor."

And again:—

"If property is taken by an officer under the supposition that it is the property of a hostile state, or of individuals, which ought to be confiscated, no municipal court can judge of the propriety or impropriety of the seizure; it can be judged of only by an authority delegated by his Majesty, and by his Majesty ultimately, assisted by your Lordships as his Council. There are no direct decisions upon such questions, because, as was stated by Lord Mansfield in Lindo *vs.* Rodney (Douglas, 592), they are cases of rare occurrence."*

The opinion given by Lord Tenterden, without reasons assigned, is in these words:—

"We think the proper character of the transaction was that of hostile seizure made, if not *flagrante*, yet *nondum cessante bello*, regard being had both to the time, the place, and the person, and consequently that the municipal court had no jurisdiction to adjudge upon the subject; but that, if anything was done amiss, recourse could only be had to the government for redress. We shall, therefore, recommend it to his Majesty to reverse the judgment."

The case Mitchell *vs.* Harmony† distinctly recognizes the principle which we state, but with some limitations, which may hereafter be found too stringent for its fair operation. In that case Mr. Chief Justice Taney said:—

"There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer,

*1 Knapp's Reports, 357. †13 Howard's Rep. 115.

charged with a particular duty, may impress private property into tl public service, or take it for public use. Unquestionably, in such cases the government is bound to make full compensation to the owner, but the officer is not a trespasser.

"It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified."

"In deciding upon this necessity, however, the state of the facts, as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon the information of others, as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterwards that it was false or erroneous will not make him a trespasser."

"The case mentioned by Lord Mansfield, in delivering his opinion in Mostyn *vs.* Fabrigas, 1 Cowp. 180, illustrates the principle of which we are speaking. Captain Gambier, of the British navy, by the order of Admiral Boscawen, pulled down the houses of some settlers on the coast of Nova Scotia who were supplying the sailors with spirituous liquors, the health of the sailors being injured by frequenting them. The motive was evidently a laudable one, and the act done for the public service. Yet it was an invasion of the rights of private property, and without the authority of law, and the officer who executed the order was held liable to an action, and the settlers recovered damages against him to the value of the property destroyed."

"If the power exercised by Colonel Doniphan had been within the limits of a discretion confided to him by law, his order would have justified the defendant, even if the commander had abused his power, or acted from improper motives. But we have already said that the law did not confide to him a discretionary power over private property. Urgent necessity would alone give him the right, and the verdict finds that this necessity did not exist. Consequently the order given was an order to do an illegal act, to commit a trespass upon the property of another, and can afford no justification to the person by whom it was executed. The case of Captain Gambier, to which we have just referred, is directly in point upon this question. And upon principle, independent of the weight of judicial decision, it can never be maintained that a military officer can

justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify."*

Let us illustrate the subject a little further. The march of the New York Seventh Regiment, and of the Eighth Massachusetts under command of General Butler, to Washington, by the way of Annapolis, is too fresh in the recollection of most our readers to require a minute detail of facts. At Annapolis they found that the Secessionists of Maryland had disabled the locomotive, and, as had been done on the direct route, had torn up the railroad track and destroyed the bridges. Under the direction of General Butler and other officers the locomotive was repaired, the cars put in running order, the track relaid, the bridges rebuilt, the transit of the troops secured, and Washington thereby rendered safe for the time being. It was the military duty of General Butler to march his force to Washington with all possible diligence; but if his command was not under the government of martial law, then it was, so far as the rights of other persons were concerned, subject to the municipal law.

If Mr. Chief Justice Taney's positions in Merryman's case are correct, then General Butler, and all of the Massachusetts Eighth and New York Seventh, were mere trespassers, severally liable to actions of trespass in favor of the railroad company and the inhabitants upon whose lands they came; and in such actions the sheriff would probably have been ordered to arrest the bodies of the defendants if it could have been done. Bail could hardly have been procured, and instead of arriving in Washington for the defence of the capital, the sheriff would have filled the jail of the county, and hired extra prisons in which to incarcerate them. If we are not misinformed, the Chief Justice of the State was one of the signers of a petition to that true and tried patriot, Governor Hicks, to call the Legislature together for the purpose of securing the secession of Maryland; and he would perhaps have presided at the trial, and with a Baltimore or any other Secession mob for a jury, the result may be imagined. In the meantime the Secessionists of that State would have mustered in force; those of Virginia and the other rebellious States would have been en-

*13 Howard's Rep. 134, 137.

couraged thereby to assail Washington on the other side, whereupon it must have fallen into the hands of the rebels, and the dismemberment of the Union have been surely accomplished.

If there is any person who has been of opinion that the ordinary principles of municipal law are applicable in times of war to bodies of troops under arms for active service; that such troops are governed by martial law on the one hand, so that it is death to refuse obedience to the command of their officers, and by the municipal law on the other, so that they are trespassers, liable to arrest and imprisonment if they do obey; that martial law requires them to arrest spies and traitors, and that the *habeas corpus* immediately requires the commanding officer who has the charge of the military operations of the camp to leave his command for the purpose of making a return before Chief Justice Taney, on penalty of an attachment, fine, and imprisonment if he disobeys—let him contemplate the practical result to which that doctrine leads, and then say which is the greatest evil, the entire arrest of military operations in time of war by civil process, or the imprisonment of a few persons, more or less, without warrant, some of them, we may admit, being quite innocent, and their imprisonment unjust.

But perhaps some one will say, that the catastrophe supposed could not have taken place; that General Butler would not have permitted himself and his command to be arrested in that way, but would have effectually resisted the arrest. Quite probable. But if Mr. Chief Justice Taney is right in his positions, it would have been the legal duty of the commander and the men to submit to the arrest, and his and their refusal and forcible resistance would have been an outrage on the law, some fifteen hundred times greater than that of General Cadwalader in declining to bring up his prisoner on the *habeas corpus*. Besides, forcible resistance of a sheriff in the execution of his office is a crime, and the General and all his troops engaged in the resistance would thereby have made themselves liable to imprisonment.

The question has suggested itself, whether General Butler, in occupying the railroad and his places of encampment, was not exercising a right of *eminent domain* merely, and that from the necessity of the case. In one view it may be so regarded. The

government may be bound to make compensation. But he was just as much authorized and bound to pursue his march at the peril of any opposing force, and to make arrests without warrant, for the accomplishment of his object, as he was to take private property for the purpose; and these are martial rights. The case is quite as clear with reference to a military force in a fort, or camp, in time of war. They are bound to military obedience under the penalties of martial law. And if the persons who hold and occupy the military station are under the government of martial law, no persons can come from without, bringing with them a different rule for the government of their actions within its limits. They can have no egress and regress except by permission of the commander or a superior officer, in the shape of a military order. This will, doubtless, be readily conceded in the case of private persons. But it extends equally to the judges, and, in the case of a United States military station, even to the Governor of the State in which it is situated. If they enter by permission, they subject themselves to the rule. It is not intended by this that they are enlisted and subject to duty, for martial law does not so order. But it is not quite clear that, in case of an attack, they might not be required to man the defences and do the duty of a soldier. Probably such is the fact. And the service thus performed would not entitle them to an action, either of contract or tort, against the commanding officer. Possibly Mr. Chief Justice Taney would admit that no one but the marshal or sheriff could claim admission, and that he could do so only for the service of process. But if he possessed such a right, as the officer of the municipal law, it would subject the military service in time of war to the interference of any and every one who pleased to sue out writs for the arrest of persons engaged in the military service, or who desired to have an investigation made into the affairs of the station, through the agency of a search-warrant.

The issuing of the process, it may be said, is a matter of right, and, if issued, the sheriff on the receipt of it is bound to obey the command of the writ, if he may rightfully do so. It is nothing to him that the service of his process requires him to enter a military camp, if he has the legal right so to enter. It will not suffice to say that the sheriff should exercise a discretion. The municipal

law does not vest him with a discretion. It is nothing to him that the camp is in the vicinity of the public enemy, and that active military operations are hourly expected—except as this might affect his personal safety. He is bound to serve his process, and for that purpose to search, if necessary. If he is resisted, it is his duty to summon the *posse comitatus*, and to proceed at its head, and with its assistance, in the execution of his duty. And thus he assaults the camp in the rear, perhaps, while the public enemy attack it in front. Such a right would be entirely antagonistic to the right of the commander to conduct his military operations, according to the exigencies of the war, without interference.

But all this sinks into insignificance when compared with the mischief which might ensue from the right to have writs of *habeas corpus* executed within military stations, as a matter of right, at the pleasure of all petitioners, or even as a matter resting in the discretion of a judge who has no means of determining whether it can be done without detriment to the public service. In time of war, the warrant of the provost marshal and the writ of *habeas corpus* are antagonistic forces, which cannot subsist together, and the latter must give way; otherwise a party under sentence of a court-martial to be hung as a spy, and upon the gallows with the rope around his neck, may be effectually reprieved by the order of a judge that the commanding officer shall produce the person before him, that the cause of his imprisonment may be inquired into, it being alleged that the conviction was erroneous.

In the present instance, Mr. Chief Justice Taney issued an attachment against General Cadwalader for his contempt in not producing the prisoner on the *habeas corpus*. The marshal returned, that he proceeded, on the 25th of May, to Fort McHenry for the purpose of serving the writ; that he sent in his name at the outer gate; that the messenger returned with the reply that there was no answer to his card; and that, therefore, he could not serve the writ as commanded, not being permitted to enter the outer gate; whereupon the Chief Justice remarked, "It is a plain case, gentlemen, and I shall feel it my duty to enforce the process of the court." This certainly looked like testing the principle by a practical illustration. But after stating the reasons for ordering an attachment, he remarked:—

"In relation to the present return I propose to say that the marshal has legally the power to summon out the *posse comitatus* to seize and bring into court the party named in the attachment; but it is apparent he will be resisted in the discharge of that duty by a force notoriously superior to the *posse comitatus*, and, such being the case, the court has no power under the law to order the necessary force to compel the appearance of the party. If, however, he was before the court, it would then impose the only punishment it is empowered to inflict,—that by fine and imprisonment."

This is certainly a remarkable collision, only equalled, if equalled, by the case of General Jackson and Judge Hall at New Orleans in the war of 1812.

The Chief Justice delared that, if the General commanding the fort and the military district were before him, he would imprison him, and thus, it seems, deprive the government of his services without regard to consequences. He is withheld from requiring the marshal to summon the *posse*, break into the fort, and capture the commanding general, only by the fact, of which he assumes to take judicial notice, that the marshal would be resisted in the discharge of that duty by a force notoriously superior to the *posse*. He declines to require the marshal to commence another civil war only because he was likely to get the worst of it. But how was he assured of this? If the marshal had summoned the *posse*, the Secessionists of Maryland would have had a better chance to capture the fort by volunteering under his banner than they are likely to have under any military commander.

If newspaper reports may be trusted, a New York county judge named Garrison, recently made a demonstration as if he would carry the precedent a little farther. Having issued a *habeas corpus*, in the case of the Police Commissioners of Baltimore, and failing to receive a return of the prisoners before him, he prudently made the inquiry how many men in the county could be mustered as a *posse comitatus* to enforce the process. The answer, that the number might be about fourteen hundred, but that it would require from five to ten thousand men to effect the object, and that moreover the county was not provided with the necessary artillery, is significant of results, if foolish judges forget that a time of war brings with it other duties and obligations than those which govern

in time of peace.* The circumstance forcibly reminds us of a paragraph in an opinion of a late learned Attorney General, Mr. Caleb Cushing, in the case of the Sitka, as follows:—

"I do not mean to say, or to intimate, that the issue of a writ of *habeas corpus* in the present instance was particularly exceptionable, at least in comparison with other cases of more obvious indiscretion in this respect, which daily occur in the United States. But, indeed, if there be anything in the practice of the courts of the States, at the present time, most of all exceptionable, it is the indiscreet levity with which they issue the writs of *habeas corpus ad subjiciendum*, regardless of the old and sound rule to refuse it, when the petition itself shows the absence of good cause, or that the petitioner is lawfully held by some other jurisdiction. (*Ex parte* Kearney, 7 Wheat. 38. *Ex parte* Watkins, 3 Peters, 201. *Ex parte* Milburn, 9 Ib. 704.) That great prerogative writ is now so cheapened by the multitude of hands to which it is committed, and by the consequent abuse of it, that it is itself rapidly degenerating into a mere abuse."†

We are aware that, when we reason upon legal subjects with a reference to consequences, there are generally those who are ready to say, "Let consequences take care of themselves,—*Fiat justitia ruat cœlum.*" It is to be noted, however, that we do not base our opinions in this case upon any considerations of expediency; nor upon any necessity which requires that the provisions of the Constitution in favor of private right and personal liberty should be subverted, or even suspended for a time; nor upon any notion that there are times when he who possesses the power should exercise it for the public good and take the consequences that may thereby ensue from the violation of private right. Such cases may exist, but we do not rely upon them. Our position is, that the principles we have thus endeavored to maintain are in accordance with the Constitution, and under the Constitution.

Magna Charta and the general principles of the common law, while they recognize and protect private rights, such as the right to be secure from searches and seizures, the right to the *habeas corpus*, and the like, recognize at the same time the necessities of

* Since this article was written, Judge Garrison has surrendered to "inevitable necessity."

† 7 Opinions of Attorneys-General, 132.

war ; and, in case of actual war, make those rights subservient to the martial law, wherever that exists.

The Constitution of the United States recognizes these private rights, and it confers at the same time the right to make war and to suppress insurrection. This right carries with it, as an incident, the power and right to carry on military operations in the usual mode, and with the usual effect ; to have armies, forts, and camps, and to govern them in time of war, as other nations govern armies and military stations, by martial law ; which, when it comes into existence in time of war, under the constitutioanal right to make war or to suppress insurrection, is necessarily *the paramount constitutional right and power*, from the nature of the case. It will always be so in practice, whatever might be supposed to be the strict legal right, and we need not shudder, therefore, if we find that the practice is sustained by sound constitutional principles, instead of being a violation of the rights of the citizen.

Peace and war cannot exist in the same place at the same time. Let us not murmur if we cannot have peace, with the arts of peace and the rights of peace, at the same time that we are obliged to have war, with the necessities of war and the powers of war. Let us be thankful that it is so seldom that this constitutional martial rule is over us, and that when it is so, its operations are very limited as respects territory, and its powers in regard to persons and property ; and that, in this case, the private inconvenience and suffering are but as the small dust of the balance when compared with the great public good to be obtained by the preservation of the constitutional government of the country.

APPENDIX.

The following note to an article on Constitutional Law, in the number of the North American Review for April, 1862, explains itself, and the reasons for its publication:

Perhaps in this connection we ought to pay "the cold respect of a passing glance" to what appeared as an editorial in a Boston daily newspaper, assailing our article respecting Habeas Corpus and Martial Law, in the number for October, 1861.

There is a kind of argumentation in which we are not inclined to participate, and for which we have no respect, since it consists in grave misstatements of the positions maintained by others, followed by an attempt to controvert the positions thus assumed for them.

The writer of that editorial placed himself beyond the pale of fair discussion when he said: "The return to the writ, a copy of which is before us, presents only the naked question whether *the President of the United States can suspend the writ of habeas corpus without an act of Congress? The Reviewer says he can do so in time of war.*" Again: "If the Reviewer means to assert, *as we presume he does*, that any or all of these things constituted a state of war in legal acceptation *in the State of Maryland, so that all its citizens were under martial law*, as the Reviewer defines it, he means to assert a proposition which he would have done well to have supported by some show of argument." And again: "According, then, to this Reviewer, a proclamation of the President, (Congress not being in session, and no war foreign or civil declared by them,) calling out the militia to suppress an insurrection in certain States, *places every other State, in which any portion of those forces may happen to be moving or resting, under martial law*, as defined by the Reviewer himself; or, in other words, *it creates a state of war throughout the country, where there are any such*

troops even in transitu. This doctrine rests for the present on the authority of the North American Review."

The first of the above extracts certainly presents itself as a very gross misrepresentation when taken in connection with a paragraph contained in an extract from our article in the editorial itself, and which the writer therefore must be presumed to have read. It is in these words: "*Whether the President possesses the power to order or authorize* it [the suspension of the writ of *habeas corpus*] as an incident to his office of commander-in-chief of the army and navy, or whether he has it as an incident to his duty to see the laws faithfully executed, *we do not propose to inquire.* The opinion of the learned Attorney General upon the latter point is already before the public, and *we do not deem the settlement of those questions necessary to our present purpose.*" And in accordance with the statements thus made, we carefully forbore to express any opinion upon that subject, arguing the right of General Cadwalader to refuse to produce Merryman upon other and entirely different grounds, saying that, "in time of actual war, whether foreign or domestic, there may be justifiable refusals to obey the command of the writ without any act of Congress, or any order or authorization of the President, or any State legislation for that purpose; and the principle upon which such cases are based is, that the existence of martial law, so far as the operation of that law extends, is *ipso facto*, a suspension of the writ."

Then, again, in relation to the statements that we maintained that *all the citizens* of Maryland *were under martial law*, or even that *war existed there*, and that calling out the militia to suppress an insurrection in certain States *places every other State, in which any portion of those forces may happen to be moving or resting, under martial law*, there is not the least possible excuse for such a misrepresentation. Having come to the conclusion that the existence of martial law, so far as it extends, operated as a suspension of the writ, we proceeded to the question, "Was martial law in existence *at Fort McHenry* at the time when the writ was issued and the return made?" We neither inquired whether all the citizens of Maryland were under martial law, nor indicated an opinion that they were so. Nor did we imply that martial law existed when and where Merryman committed the acts, whatever they were, for which he was arrested. We stated our position in these express words: "Now, it may, we think, be laid down as a safe principle, that in time of war any fort or camp occupied by a military force, for the purposes of the war, is *ipso facto*, without any special proclamation, under the government of martial law such as we have described it. And the same, in our opinion, as at present advised, is equally true of any

column of soldiers mustered into active service for the like purpose, whether on the march or at rest. It is not necessary to speak of soldiers mustered into the service of the government, but stationed at a distance for the purpose of being called into active service when occasion may require. They may, or they may not, be under government of military law only, as in time of peace. But this cannot be said of troops actively engaged in the service of the government. Whether those troops are in the face of the enemy in battle array, or whether they are merely garrisoning a fort *to aid thereby* in suppressing a rebellion, or whether they are opening and holding the avenues by which the passage of other troops to the theatre of active war is to be facilitated, the law which governs *the place where they are* is martial, and not municipal."

This character of misrepresentation runs through the paper so far as it relates to our article; but we do not propose to follow this matter further. Our inducement to refer to the paper at this time was what seemed to be the course of its argument that there was no "war," because war had not been declared by Congress. In one of the paragraphs above quoted, we find, "Congress not being in session, and *no war, foreign or civil, declared by them.*" In another paragraph the writer says: "From beginning to end the article reiterates, through forty-seven pages, that there was a 'state of war,' a 'time of war,' and an 'existence of war.'.....But the whole of this is the *ipse dixit* of the Reviewer." Again: "No one can fail to see how serious must be the doubt whether any proclamation of the President can create a state of war, and bring into exercise all the laws of war, where no war, foreign or *civil, has been declared by Congress.* If the suppression of a rebellion, however extensive, comes within the *war power* of the federal government at all, in the strictly legal sense of that power, it is clear that Congress alone can exercise that power under the Constitution."

Now, as the United States cannot declare war against any State of the Union, and as *war* is not usually declared against an insurrection, or against insurgents, and we may safely conclude never will be so declared by Congress, the conclusion seems to follow that we cannot have a civil war in the United States. What is now going on along the coast at different places—in Albemarle Sound, Kentucky, and Tennessee—is not *war?* It is only fighting! Great Britain, France, and Spain have acknowledged the Confederates as belligerents; but that does not constitute the contest a *foreign* war. And so, according to the editorial, there are two belligerents without any war.

But we are not without authority on this subject. See the case of "The Tropic Wind," decided by Judge Dunlop, U. S. District Court for the Dis-

trict of Columbia, June Term, 1861; in which his Honor said, referring to the President's proclamation: "These facts, so set forth by the President, with the assertion of a right of blockade, amount to a declaration that civil war exists." See also the case of the "Amy Warwick," decided by Judge Sprague, U. S. District Court for the District of Massachusetts, February, 1862, where the learned Judge disposed of the matter in this wise: "As the Constitution gives Congress the power to declare war, some have thought that, without previous declaration, war in all its fulness, that is, carrying with it all the incidents and consequences of a war, cannot exist. This is a manifest error. It ignores the fact that there are two parties to a war, and that it may be commenced by either.....How this civil war commenced, every one knows.....This war—open, flagrant, was flagitious war; and it has never ceased to be waged by the same confederates with their utmost ability. Some have thought that, because the rebels are traitors, their hostilities cannot be deemed war, in the legal or constitutional sense of that term. But without such war there can be no traitors. Such is the clear language of the Constitution."

The editorial admits that Chief Justice Taney had judicial knowledge of the proclamation. On these authorities, then, he had judicial knowledge of the existence of war; and he was of course put upon the inquiry whether he could require the military commander of Fort McHenry to come out of the fortress in time of war, and bring a prisoner before him. The return that the President had suspended the *habeas corpus* pressed that inquiry upon him, whether the President could or could not suspend the writ.

In the introductory chapter to a pamphlet upon "Presidential Power over Personal Liberty;" "Imprinted for the author, 1862," it is said:

"The arguments in favor of the right of the Executive to arrest and detain, without the benefit of the writ, may be found in the North American Review for October, 1861, said to have been written by the Hon. Joel

Parker, of the Cambridge Law School; the opinion of the Attorney General of the United States, and a pamphlet written by Horace Binney, Esq., of Philadelphia."

The writer of the article in the North American Review will be obliged to the anonymous author of the foregoing paragraph, if he will either point out the portion of the article where he finds the argument in question, or make an acknowledgement of his error as publicly as he has made the assertion.